

#2453

signed 2-9-99

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

**ARTHUR CHARLES HOGELIN,

DEBTOR.**

**CASE NO. 98-43085-13
CHAPTER 13**

ORDER GRANTING STAY RELIEF

This matter is before the Court on the second motion for stay relief filed by creditors David and Deronda Cain. Both the debtor and Alaska Seaboard Partners, L.P. (“Alaska Seaboard”), have filed objections. The Cains appear by counsel Vernon L. Jarboe and R. Greg Wright. The debtor appears by counsel Gary H. Hanson. Alaska Seaboard appears by counsel Robert D. Lantz. The Court has reviewed the relevant pleadings and is now ready to rule.

FACTS

Late in 1997, the Cains bought a house from Alaska Seaboard. The debtor acted as the partnership’s real estate agent in the transaction. Since the sale, the Cains claim to have discovered numerous defects in the house, including termite damage, that neither Alaska Seaboard nor the debtor disclosed to them. They allege they have spent \$41,332.86 to repair the undisclosed defects. Sometime in 1998, they sued the partnership and the debtor in state court based on the alleged failure to disclose material facts about the defects. Apparently, they asserted causes of action for breach of contract, negligent misrepresentation, and violation of the Consumer Protection Act.

Later, on November 4, 1998, the debtor filed his chapter 13 bankruptcy petition. The debtor proposes to pay 5% of the unsecured claims against him through his chapter 13 plan. The Cains have filed a proof of an unsecured claim based on the causes of action asserted in their state court lawsuit. They sought stay relief and obtained an agreed order that allowed them to depose the debtor in mid-December. In the state court suit, Alaska Seaboard thereafter filed a motion for summary judgment on the Cains' claims against it, and also filed a third-party petition against two additional parties. The partnership also alleges that the debtor filed a motion to dismiss in that suit, and asked for leave to file counterclaims against the Cains in the event the suit proceeds.

Then on the last day of December, the Cains filed a second motion for stay relief, asking to be allowed to pursue their claim against the debtor to judgment so that they could make a claim against the Kansas Real Estate Recovery Revolving Fund ("Revolving Fund"). They indicated that, should they obtain a judgment, they were not asking to be permitted to execute on it against the debtor personally or against property of the bankruptcy estate. The debtor objected to the motion on three grounds: (1) the Cains' lawsuit is in its early stages and has recently been expanded through a third-party petition; (2) the lawsuit will be expensive and the debtor will have to find some way to pay his defense costs over time; and (3) if the Cains recover from the Revolving Fund, the debtor will lose his real estate broker and salesperson license and be unable to supplement his chapter 13 plan with real estate sales commissions. Alaska Seaboard also objected, repeating some of the debtor's arguments, but also alleging that the state court judge mistakenly believes the state court suit cannot proceed as to any of the parties absent stay relief for all the parties, and asking this Court to hear and determine the entire state court lawsuit.

DISCUSSION AND CONCLUSIONS

As a preliminary matter, the Court notes that the automatic stay imposed by 11 U.S.C.A. §362(a) enjoins only actions directed against the debtor. The state court lawsuit may and should proceed without permission from this Court as to all parties and claims against anyone other than the debtor. At this point, the Court is aware of no claims against the debtor in that suit except those made by the Cains. The Cains' claims against the debtor should proceed along with the rest of that suit if "cause" exists that justifies granting them stay relief.

The Cains have filed a proof of claim in the debtor's bankruptcy case and their claim must be determined before the chapter 13 trustee can make distributions on the unsecured claims. In addition, there is a potential source besides the debtor or his bankruptcy estate, the Revolving Fund, for them to be paid up to \$15,000 if they succeed in establishing that the debtor is liable to them on certain grounds. *See K.S.A. 58-3023 (repealed L. 1980, ch. 164, §47) (establishing fund) (Furse 1994); K.S.A. 1997 Supp. 58-3066(a) (continuing fund in existence); K.S.A. 58-3067 (limiting recovery from fund to \$15,000 per transaction); K.S.A. 1997 Supp. 58-3068 (specifying permissible bases for recovery from fund).* These circumstances demonstrate that the Cains' claim against the debtor must be liquidated in some forum. Since the claims appear to be based solely on state law and this Court would have at best questionable jurisdiction to resolve the Cains' claim against Alaska Seaboard and Alaska Seaboard's claims against the third-party defendants, the interests of judicial economy and avoiding inconsistent litigation results clearly favor having the entire lawsuit resolved in the state court. The Court believes these circumstances constitute "cause" for granting stay relief to the extent sought by the Cains unless the debtor or Alaska Seaboard has raised an offsetting reason not to do so.

The debtor's first ground for opposing the Cains' motion is based on a factual distinction between this case and a decision this Court made a number of years ago. *See In re Wilson*, Case No. 86-41147-13, Memorandum of Decision (Bankr.D.Kan. July 9, 1987). However, although the late-in-the-litigation status of the stay relief motion in that case was a factor weighing in favor of granting relief, the earlier status of the state court proceeding here does little to suggest this Court should require the Cains to litigate their claim against the debtor here while the balance of the lawsuit proceeds in state court. The debtor's second ground would be more persuasive if he could properly be protected from litigation expenses by the denial of the Cains' motion, but he cannot. The Cains are entitled to have their claim determined somewhere, and the only real question before the Court is where it should be determined. There is no reason to think his defense costs should be any higher in state court than before this Court, so this ground does not affect the Court's view that stay relief should be granted. Other courts have also ruled that potential litigation expenses are not a basis for denying stay relief. *See, e.g., In re Nkongho*, 59 B.R. 85, 86 (Bankr.D.N.J. 1986).

The debtor's third ground for opposing stay relief presents the most difficult question for the Court. However, K.S.A. 1997 Supp. 58-3050(a)(1) provides that a real estate brokers' or salesperson's license may be revoked or suspended, among other things, if the licensee has violated the Real Estate Brokers' and Salespersons' License Act ("License Act"), K.S.A. 1997 Supp. 58-3034 *et seq.*, or rules and regulations adopted under it, and subsection (e) indicates such action is taken through an administrative proceeding before the Kansas Real Estate Commission ("Commission"). In fact, Kan. Admin. Reg. 86-3-15(a)(1) (1997) indicates the debtor was required to report to the Commission the allegations made against him in the Cains' lawsuit, so it appears his license could

already be in jeopardy. Furthermore, nothing in the statute governing recovery from the Revolving Fund directly addresses the status of the license of a broker or salesperson whose actions lead to such a recovery. *See K.S.A. 1997 Supp. 58-3068*. Of course, since a violation of the License Act or a related act is required to support a recovery from the Revolving Fund, it is likely the responsible licensee would face discipline as a result of such a recovery. In any event, the debtor cannot use bankruptcy to hide from the consequences of his pre-bankruptcy violation, if any, of the License Act, unless perhaps the Commission were to revoke or suspend his license only because he failed to pay a judgment the Cains might obtain against him.

The Court now turns to Alaska Seaboard's separate arguments in favor of denying stay relief and instead exercising jurisdiction over the entire state court lawsuit. The partnership correctly asserts that the Court has jurisdiction to determine the Cains' claim against the debtor, but neglects to explain how the Court has jurisdiction to decide all the claims in the state court lawsuit that do not involve the debtor, namely the Cains' claim against the partnership and the claims the partnership has asserted against third-party defendants. Besides the benefits of resolving interrelated disputes in one forum, the Court's lack of authority over those matters not involving the debtor is probably the main factor weighing in favor of granting stay relief here. So far as the Court is aware, all the claims made before the state court arise from the Cains' purchase of the house from Alaska Seaboard, so much of the evidence regarding them will presumably be the same. In the interests of judicial economy and avoiding inconsistent results, the claims, the Court is convinced, should all be resolved in the same forum. Alaska Seaboard also points out that the debtor's potential counterclaims against the Cains might bring money into the debtor's bankruptcy estate, and suggests the Court, the debtor, and the chapter 13

trustee can control and supervise them better if they are litigated here. These presently hypothetical claims provide no more reason for the Court to deny stay relief than do the claims that the Cains have actually asserted.

For these reasons, the Court hereby grants the Cains' second motion for stay relief. They may pursue their state court lawsuit against the debtor to the point of obtaining judgment and seeking recovery from the Revolving Fund, but must return to this Court before trying to collect any judgment from the debtor personally or from his bankruptcy estate. As stated earlier, the claims that have been asserted in the state court against parties other than the debtor are not subject to the automatic stay and may be pursued without regard to the debtor's bankruptcy case.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this _____ day of February, 1999.

JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE